IN THE

Supreme Court of the United States.

AUSTIN W. LORD and J. MONROE HEWLETT, doing business under the firm name of LORD & HEWLETT,
Claimants-Appellants,

AGAINST

THE UNITED STATES,
Defendant-Appellee.

Brief for Appellants.

Statement of the Case.

This is an appeal from a judgment of the Court of Claims, entered on the 9th day of March, 1908, in favor of the defendant, and dismissing the petition of the claimants.

The action was brought by the claimants, Austin W. Lord and J. Monroe Hewlett, achitects, doing business under the firm name of Lord & Hewlett, to recover from the defendant damages for breach of contract, for refusing to allow them to carry out the work in connection with the erection of a building for the Department of Agriculture in the City of Washington.

The case was argued and submitted before the Court of Claims on January 7, 1908 (Rec., p. 5). On March 9, 1908, the Court filed its findings of fact and conclusions of law. On March 17th, claimants filed a motion to amend the findings, which was argued on April 13, 1908, and on April 20, 1908, the Court withdrew the former findings and filed amended findings, the judgment and opinion remaining unchanged. (Rec., p. 6).

The defense of the United States is a general denial. (Rec., p. 5).

From the judgment of the Court of Claims in favor of the defendant, and dismissing the petition on May 7th, 1908, claimants appealed to this Court. (Rec., p. 21).

Statement of Facts.

The claimants are architects, and were partners during all the times of the various transactions involved, and still are partners. The firm name is Lord & Hewlett, and both the claimants are citizens of the United States and residents of the State of New York. (Rec., p. 6).

On March 2, 1901, Congress, in the General Appropriation Act, inserted a provision as follows (Rec., p. 6):

> "To enable the Secretary of Agriculture to have prepared, under his direction, plans for a fireproof administrative building, to be erected on the grounds of the Department of Agriculture, in the City of Washington, said plans, and such recommendations thereon as the Secretary of Agriculture may deem necessary, to be transmitted at its next regular session, five thousand dollars, to be immediately available."
> Approved March 2, 1901.

In order to carry out the provisions of the Act, the Secretary of Agriculture, appointed a Commission of award, and invited several architects and firms of architects to submit plans, and caused to be drawn up, "a programme and conditions of a competition," which is set forth in full in the record, pages 7, 8, and 9, but the material portions of which are as follows:

> "It must be understood, however, that while the ultimate purpose of the competition is the selection of an architect, the act does not provide for a building, but simply for a design to be approved by Congress at the next session; and, therefore, while it is to be supposed that the architect, or firm of architects whose designs shall be placed first in this competition, will receive the commission to carry out the work when the building is authorized, it must be understood that the Secretary of Agriculture has no authority at this time to enter into any contract *further than is provided for by this programme.* The programme sets forth, approximately, the conditions and location of the building, modifications of which may become necessary. If Congress provides for the erection of the building *the selected*

architect is then to prepare such design or designs as may, in the judgment of the Supervising Architect of the Treasury, be necessary to meet the *conditions finally adopted by him.* * * *

A uniform sum of three hundred and fifty dollars ($350) will be paid to each of the competitors invited, *with the understanding and agreement* that unless otherwise provided for by Act of Congress, the architect or architects whose design shall be placed first will be awarded the commission for carrying out the work, at a fee computed on the basis of the schedule of charges adopted by the American Institute of Architects." (Italics ours.)

The claimants had previously been invited to enter the competition under this programme, and they did so, received the award, and their plans were selected (Rec., pp. 9-10). Thereafter full discussion of these plans and of the needs of the Department of Agriculture was had with the Department, and the Department proposed certain more expensive materials, and certain increases in size over the claimants' successful plans. As a result of these changes it was agreed by both parties that if they were carried out, it would necessitate an increase in the cost of the proposed building from $2,000,000, the amount provided for in the programme, and to meet which the claimants' plans had been designed, to approximately $2,500,000 (Rec., pp. 9-10).

A Bill calling for an appropriation of $2,500,000., together with the original plans accepted by the Secretary of Agriculture, was sent to Congress, in accordance with the provisions in the Act of March 2, 1901, but nothing was done by Congress until February 9, 1903 (Rec., p. 10), when an Act was passed in the following terms:

"AN ACT FOR THE ERECTION OF A BUILDING FOR THE USE AND ACCOMMODATION OF THE DEPARTMENT OF AGRICULTURE.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of Agriculture be, and he is hereby authorized and directed to cause a suitable and

commodious fireproof building, for the use and accommodation of the Department of Agriculture, including all of its bureaus and offices now occupying rented quarters in the District of Columbia, to be erected on such portion of the grounds of the Department of Agriculture belonging to the United States as he may deem expedient, immediately in the vicinity of the present building, said building to be constructed in accordance with plans, to be procured, based on accurate estimates, providing for the erection of said building, complete in all its details, as herein described, and within the total cost of not exceeding the sum herein stipulated, and he is hereby authorized after procuring such plans, and after due advertisement for proposals, to enter into contracts within the limit of cost hereby fixed, and subject to appropriations to be made by Congress, for the erection of said building complete, including heating and ventilating apparatus, elevators and approaches, and the removal of the present building or buildings of the Department of Agriculture on said grounds.

"SEC. 2. That the supervision of the construction of said building shall be placed in charge of an officer of the Government, especially qualified for the duty, to be appointed by the Secretary of Agriculture, subject to the approval of the head of the department in which such officer is employed, who shall receive for his additional services an increase of twenty-five per centum of his present salary, such increase to be paid out of the appropriation for the building herein authorized.

"SEC. 3. That the limit of cost for the construction of said building complete, including heating and ventilating apparatus, elevators and approaches, and the cost for removal of the present building or buildings of the Department of Agriculture, is hereby fixed at One million five hundred thousand dollars, and no contract shall be entered into or expenditure authorized in excess of said amount.

"Approved, February 9, 1903."

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After passage of the Act of March 2, 1901, the Secretary of Agriculture had appointed an advisory building committee, and designated as his expert in the matter, Mr. James Knox Taylor, Supervising Architect of the Treasury Department, who remained in that capacity until May, 1903, when he was summarily removed, and Captain John S. Sewell appointed in his stead on May 4, 1903. (Rec., p. 11.)

Immediately subsequent to the passage of the Act of February 9, 1903, the claimants were notified by the Department, and negotiations taken up for the purpose of meeting the modifications made necessary by the reduction of the appropriation (Rec., p. 11), and many interviews and consultations took place with Mr. Taylor and Dr. Galloway on behalf of the Department, and much correspondence passed with this object in view. Various modifications in the plans were made and submitted by the claimants to meet the changes necessitated by the reduced appropriation of Congress, and at the same time satisfy the personal wishes of the Secretary of Agriculture. Everything progressed smoothly until April 15th, 1903, when Dr. Galloway wrote the claimants, on behalf of the Secretary of Agriculture, expressing doubt as to their ability "to carry out the spirit and letter of the law," and stating that the Secretary wished for that reason "to terminate present relations" with the claimants. (Rec., p. 11.) On April 17th, 1903, the claimants wrote the Secretary, stating that it was entirely feasible to carry out the law in every respect, and asking for a personal interview. This request was granted, the interview took place, and further plans were submitted by the claimants, which satisfied the Secretary, and the relations between the claimants and the Secretary continued without interruption. (Rec., p. 12.)

These plans were not working drawings, but were block plans, tentative sketches and elevations (Rec., p. 12), made and finally agreed upon by the Claimants and the Department, in accordance with the program of competition, which provided as follows:

> "The program sets forth, approximately, the conditions and location of the building, modifications of which may become necessary. If Congress provides for the erection of the building *the selected architect* is

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then to prepare such design or designs as may, in the judgment of the Supervising Architect of the Treasury, be necessary to meet the conditions finally adopted by him * * * ." (Rec., p. 7.) (Italics ours.)

On May 4th, 1903, the claimants were notified to visit Washington on May 7th for consultation. (Rec., p. 12.)

The conference of May 7th, 1903, "had to do exclusively with the preparation and execution of a written contract for their employment as architects for the said building" (Rec., p. 12).

At this time two forms of written agreement were submitted by Captain Sewell to the claimants (Rec., pp. 12-16), neither of which would the claimants accept, their reasons being that these forms did not embody the terms of the original agreement for their employment, as set forth in the programme (Rec., pp. 7-8). As a result of their refusal to sign Captain Sewell's proposed forms of contract, the claimants were summarily dismissed by the Secretary of Agriculture on May 13, 1903 (Rec., p. 16).

The claimants maintained that they were entitled to perform full professional services, including the usual architectural supervision, which they were unwilling to entrust to other hands, and receive compensation on that basis, at 5%, as provided by the programme (Rec., p. 7), and the schedule of the American Institute of Architects (Rec., pp. 16-17), which terms they had accepted and under which they had acted. Captain Sewell insisted upon his own basis of work and compensation, and refused to recognize the original programme, or any right under it. On that rock it was, and on no other, that the parties split.

Brief of the Argument.

We shall endeavor to establish the following propositions:

1. The programme of competition with its conditions, offered the claimants by the Secretary of Agriculture, under the Act of March 2, 1901; the acceptance by the claimants of its terms; the selection thereunder by the Secretary of Agriculture of the claimants' plans, and the subsequent Act of February 9, 1903,

authorizing the building, constitute a binding contract between claimants and the United States.

2. It was so recognized by the Secretary of Agriculture who upon the passage of the Act of Feb. 9th, 1903, called upon the claimants for the performance. Claimants performed fully under such contract so far as permitted by the Secretary of Agriculture, and without default on their part and without just cause, were prevented from completing performance.

3. The measure of damages which the claimants are entitled to recover for breach of this contract, is the compensation which the contract awarded them, and which they would have received had they been permitted to complete their performance of it.

POINT I.

The programme of competition with its conditions, offered the claimants by the Secretary of Agriculture under the Act of March 2, 1901; the acceptance by the claimants of its terms; the selection thereunder by the Secretary of Agriculture of the claimants' plans, and the subsequent Act of February 9, 1903, authorizing the building, constitute a binding contract between claimants and the United States.

The Programme of Competition (Rec., pp. 7-9) as previously stated, contains two provisions which are so clear in their purport as to scarcely need comment or explanation.

> "It must be understood, however, that while the ultimate purpose of the competition is the selection of an architect, the Act does not provide for a building, but simply for a design to be approved by Congress at the next session; and, therefore, while it is to be supposed that the architect or firm of architects whose designs shall be placed first in this competition, will receive the

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commission to carry out the work when the building is authorized, it must be understood that the Secretary of Agriculture has no authority at this time to enter into any contract *further than is provided for by this programme.* The programme sets forth, approximately, the conditions and location of the building, modifications of which may become necessary. If Congress provides for the erection of the building, *the selected architect* is then to prepare such design or designs as may, in the judgment of the Supervising Architect of the Treasury, be necessary to meet the *conditions finally adopted by him.* * * *

A uniform sum of three hundred and fifty dollars ($350) will be paid to each of the competitors invited, *with the understanding and agreement that unless otherwise provided for by Act of Congress,* the architect or architects whose design shall be placed first, will be awarded the commission for carrying out the work, at a fee computed on the basis of the schedule of charges adopted by the American Institute of Architects." (Italics ours.)

This is a clear and unequivocal offer of employment, with the "understanding and agreement," that unless otherwise provided by Act of Congress, the successful competitor will be awarded the commission of carrying out the work of erecting a building for the Department of Agriculture if such erection is authorized by Congress, and that the compensation for such services is to be determined by the schedule of charges of the American Institute of Architects.

The Court below, in its opinion, says the "nominal sum (of $350) was named in the programme of competition as compensation for the efforts of the competitors, and the additional inducement of permanent employment was expressly proffered the successful architect in the event of subsequent legislation authorizing the construction of the building in accordance with the said programme" (Rec., p. 17).

The "additional inducement" was the real consideration offered by the defendant to the claimants, subject to a future negative condition; namely, that no adverse action should be

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taken by Congress, and unless such adverse action were taken, the agreement was final and complete. Nothing could be fairer; nothing more clear.

The architects, at the request of the defendant, undertook to make plans for the building, to use their professional knowledge, skill and labor, things which prior to the agreement they were not *bound to do.*

This consideration is sufficient:

Newall *v.* Page, *et al.*, 10 Gray, 366.
Devecmon *v.* Shaw, 69 Md., 199.
Hamer *v.* Sidway, 124 N. Y., 538.

Offers of the kind contained in this programme have been construed by the Courts, and the construction put upon them is identical with that contended for by the present claimants.

The case of Walsh *v.* St. Louis Exposition, etc., Assn., 16 Mo. App., 502, affirmed by the Supreme Court of Missouri, in 90 Mo., 459, is directly in point. The facts in that case were as follows:

A written proposal technically known as a "programme of competition," was sent to one Walsh, a St. Louis architect, and at the same time to several other firms and individuals, inviting them to prepare competitive plans for a building to be erected in St. Louis. Among other provisions, the programme contained the following:

> "FOURTH: The architect who is successful shall not receive Five Hundred dollars, but he shall be engaged as architect and superintendent, and shall be paid for performing such duties the usual commissions as adopted by the American Institute, and the St. Louis Institute of Architects."

The plaintiff submitted designs under the programme, they were declared successful, and the defendants refused to employ him. He, thereupon, sued for his commissions, and the Court held that under the terms of the competition, the plaintiff having been successful, and the defendants refusing to employ him, or to allow him to proceed with the work, the action would lie, there being a valid offer contained in the programme, acceptance by plaintiff and the result, a binding contract.

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Another case is that of Hall *v.* Los Angeles, 74 Cal., 502. A Board of Supervisors made a proposition for plans, and by a resolution adopted those of the plaintiff, upon the condition however, that the Board should receive a bid from a reliable party, who would give sufficient bonds to erect the building in conformity with the plans of the plaintiff, for a specified sum. Such a bid was received and the Court held that upon fulfillment of this condition, the proposition, acceptance and adoption became a valid and binding contract under which the plaintiff could recover.

The latest case on the subject, is the case of Palmer, *et al. v.* The Central Board of Education, 220 Pa. State Reports 568, which was decided in January, 1909.

In that case the Pittsburgh Board of Education appointed a Committee to select, subject to its approval, a competent person as architect for the erection of a school building. The committee determined to make the selection by competition, and prepared a programme of competition which provided that the designs of the competing architects should be numbered in order of merit and the entire panel exhausted before an outside architect could be appointed. The architect was duly selected under this programme by the Committee, which reported this selection to the Board, but the Board in turn *never approved the report.* Without further action the Committee was discharged, the Board appointed a new committee, which in turn appointed an outside architect.

Thereupon, several of the original, but unsuccessful competitors brought injunction proceedings to prevent this action by the Board of Education, and compel the carrying out of the original programme. The case was tried in the Court of Common Pleas, and in granting the injunction, the Court used this significant language.

> "Of course these architects had the hope and expectation that some one of them would obtain the valuable prize of being the architect of this building; and this possibility is a sufficient consideration." Citing Molyneux v. Collier, 17 Ga., 46. (Incorrectly printed, as 17 Ala. 46.)

The Supreme Court of Pennsylvania affirmed unanimously

the unanimous decision of the Court of Common Pleas, and held that 'a contract, valid and binding, existed between the competing architects and the Board of Education.

On page 575 of its opinion, the Court says: "The case is free from difficulty," and continuing on page 576, says:

> "In any fair and reasonable method of selection by competition, the chief inducement for any one to take upon himself the labor and expense incident to the submission of plans would be the chance that upon a fair and impartial examination, his plans might win acceptance. Disappointment in this regard after labor expended and expense incurred, under such circumstances, as we have here, constitute not only a breach of good faith, but a breach of contract, resting not on doubtful terms, but on expressly admitted facts, from which an unmistakable legal obligation resulted."

This case it is respectfully submitted, is on all fours with the present controversy, and hold clearly that a programme of competition duly accepted by the architect constitutes a binding contract between the architect and the person issuing such programme. No distinction can be found between the Pennsylvania case and the one under discussion, except the fact that in the Pennsylvania case the plaintiffs seeking the injunction had not been selected as architects, but had merely certain rights under the programme of competition. Even on these facts the Court held that a valid contract existed.

A fortiori must the decision apply to a case like the present, where the architect had not only entered the competition and had thus accepted its terms, but had won the competition, been selected as the successful competitor, and notified to proceed with the work.

On what ground then does the Court below take the present case out of the general rule? Two points seem to be made: First, that although the offer contained in the programme was a valid one, it was inoperative, because *ultra vires*. Second, that the Act of February 9, 1903, was separate legislation, and not *pari materia*, and abrogated the earlier contract.

As to the first proposition, the Court in its opinion (Rec., p. 19), states that the Act of March 2, 1901, "was advisory in

character," and immediately thereafter states that the Secretary's authority was limited by the Act, except as to the manner of obtaining plans.

We are content, however, to rest on the Act itself.

It is an Act, as has been stated, *supra,* "to enable the Secretary," to obtain plans, authorizing him to expend as he saw fit, with that end in view, $5,000. of the public moneys, and then directing him to send the plans thus obtained, with his recommendations, to Congress at its next regular session.

The Secretary well knew the limitations imposed on him, and in the preparation of the official programme of competition he stated them most carefully. He offered the *chance* of erecting the building to the winner of the competition. He promised, as far as he was able, and in no uncertain terms, that he would "unless otherwise provided by Act of Congress" award the work in question to the successful architect. This was a fair and reasonable inducement to provide the best talent available in the preparation of adequate plans,—and when Congress provided for the erection of the building (Act, Feb. 9th, 1903), without limiting him, he was bound to carry out his bargain.

The practice of obtaining plans by competition is an exceedingly common and popular one, especially in public works. In adopting it, the Secretary was evidently following what appeared to him the best means of obtaining the plans which Congress had ordered him to obtain, and was clearly acting, not only within his general powers, but expressly carrying out the mandate of Congress. Palmer *et. al. v.* Central Board, etc. (*supra*). The idea of a competition which shall provide no prize for the winner is absurd, and it is needless to state that none of the reputable architects invited to compete by the Secretary, would have entered the competition in consideration of the sum of $350., to be paid them out of the $5,000. awarded the Secretary by Congress. As the Court of Claims says (Rec., p. 17), "the additional inducement of permanent employment was expressly proffered the successful architects." Such additional inducement was the real inducement, and the fundamental consideration upon which the whole contract was based. As held by the Supreme Court of Pennsylvania, *supra* (220 Pa. St., 568), "These architects had the

hope and expectation that some one of them would obtain the valuable prize * * * and this possibility is sufficient consideration." The Secretary in offering the contract set forth in the programme acted within the sphere of his authority.

As to the second proposition, that the two Acts of March 2, 1901, and February 9, 1903, were not *pari materia*, the argument seems to rest on the theory that, because the Act of February 9, 1903, was two years in maturing, and when matured, had cut down the Secretary's original estimate of the building's cost, it, therefore, had nothing to do with what had preceded. It is the first time that we have heard the proposition made, that delay in legislation on the same subject, or the award of less money than the enthusiastic sponsors of such legislation asked for, is ground for finding that such legislation does not bear on prior legislation referring to the same subject.

The argument is then made to assist this proposition, that there are two provisions in the Act of February 9, 1903, which are directly inconsistent with the provisions of the Act of March 2, 1901. The first of such provisions is that the building is to be constructed "in accordance with plans to be procured, based on accurate estimates." The second provision is as to the employment and compensation of a Government supervisor. (Rec., p. 18.)

Naturally, plans had to be procured, based on accurate estimates. Competitive drawings are not working plans. The plans sent to Congress were the competitive drawings and tentative sketches. The programme foresaw that plans would have to be made to meet the requirements of Congress, and provided for modifications and that "the selected architect is then to prepare such design or designs as may, in the judgment of the Supervising Architect of the Treasury" (the "Government Supervisor"), be necessary to meet the conditions finally adopted by him. (Rec., p. 7.) It is perfectly clear that it was contemplated by all parties that after the selection of the plans by Congress, working plans, working drawings, and all plans necessary for the actual erection of the building must necessarily be based upon accurate estimates, and would have to be prepared by the selected architect. There is nothing new or inconsistent here with the earlier Act, but on the contrary, the provision in question contemplates

clearly the existence of the earlier Act, and is designed, if language is to be given its plain interpretation, to further effectuate and carry out the provisions of the Act of 1901. The first enabled "the Secretary of Agriculture to have prepared under his direction plans for a fireproof administration building * * * ." The second authorizes and directs him "to cause a suitable and commodious fireproof building * * * to be erected on plans based on accurate estimates,"—*i. e.*, the identical further "designs necessary to meet the conditions finally adopted" which the programme of competition had provided for (Rec., p. 7.)

As to the provision, on which much stress is laid, that a Government Supervisor is to be appointed, we may add that this was but a statement of the custom adopted time out of mind in Government practice, where there is always a Government Supervisor to look after its interests. It had been done in the present instance. In the present case, Mr. James Knox Taylor had been appointed two years before on the passage of the Act of 1901, and he remained and continuously dealt with the claimants as the supervising representative of the Government under the Act of February 9, 1903, until May 4, 1903, when, for personal differences with the Secretary, he was summarily removed, and his architectural regime made to give way to the military dictatorship of Captain Sewell, which proved so disastrous to the claimants. The Act of 1903 simply provided for the compensation of this functionary, and nothing more.

The Court below lays stress on the fact that the Act of 1903 makes no reference to the Act of 1901. Congress is certainly presumed to be familiar with its own legislative acts. In the present case all the plans and recommendations in conformity with the Act of 1901, had been actually sent to Congress (Rec., p. 10). Then with these plans and recommendations before it, Congress passed the Act of 1903, and did nothing to indicate its intention of abrogating the former act. On the contrary, it so worded the second act that, read with the first, it becomes supplemental to and explanatory of it. It demands the additional plans already mentioned in the programme and provides compensation for the Supervisor who had been appointed and had been continuously acting under the Government during the

past two years. The Act of 1901, provided for the plans, the Act of 1903, for the building.

Admitting that the offer of the Secretary was *ultra vires* Congress could, of course, ratify it. The Act of 1903, passed by Congress as above indicated with the proceedings of the Secretary before it and without negativing his course in any way was clearly such a ratification.

POINT II.

It was so recognized by the Secretary of Agriculture, who upon the passage of the Act of Feb. 9th, 1903, called upon the claimants for its performance. Claimants performed fully under such contract so far as permitted by the Secretary of Agriculture, and without default on their part and without just cause, were prevented from completing the performance.

It must be apparent from the preceding that claimants were successful in meeting all requirements, as is evidenced by the fact that after their dismissal on April 15, 1903 (Rec., p. 11), the Secretary re-considered the matter, was "very well pleased," and requested the claimants to come to Washington for consultation, which consultation had only to do with the execution of a formal written contract embodying the terms of claimants' employment as architects. (Rec., p. 12.)

Up to this point it is clear that claimants had fully performed their part of the contract, and their final dismissal came not because they refused to perform, but because they refused to accept and sign either of two forms of written contract imposed on them by Captain Sewell, as such forms in no way embodied the original terms of their agreement, under which they had been acting in good faith for upwards of two years. (Rec., pp. 12-13, 16, 19, 20.)

For refusing to surrender their rights, they were summarily dismissed (Rec., p. 16).

A word more is appropriate on the subject of these proposed contracts, refusal to accept which resulted in a dismissal of the claimants. Under the programme it was provided that whoever should be selected to carry out the work of erecting a building for the Department of Agriculture, should be compensated on a fixed basis in accordance with the Schedule of Charges of the American Institute of Architects. (Rec., p. 7.) That Schedule provides for a compensation of 5% for full professional services. (Rec., p. 16.) If the claimants were employed, as is evident was the case, their compensation at least, was fixed by the earlier agreement (the programme). It cannot be claimed that the act of February 9, 1903, whatever else it may have done, in any way affected the compensation of the architects of the building. Especially is this evident as the act was carefully drawn to provide for extra compensation to be paid the Government Supervisor, who should care for its interests during the carrying on of the work.

Captain Sewell's position, as evidenced by his contracts, was that, as he was appointed Supervisor, he was, as such, performing part of the Claimants' functions, and consequently it was only fair to reduce the compensation of the architects from 5% to 3½%. Had this contention been followed out by Captain Sewell, it would at least bear consideration; but upon an examination of these two documents submitted by him it will be found that Captain Sewell not only reduced the compensation of the claimants, but insisted on their still performing full professional services as he should direct, and at a compensation fixed arbitrarily by himself.

The first of these contracts is remarkable in that while it reduced the agreed fees of the architects, it required them not only to furnish the necessary plans and specifications, but at the same time deprived them of the usual architectural supervision, and required them to furnish *for nothing* such "counsel and advice" (subject to an over-lordship of the newly appointed "advisor" of the Secretary) as might enable him ultimately to pass upon and interpret the artistic intent of the drawings and specifications (Rec., p. 13). Captain Sewell evidently perceived that in making such a suggestion he was over-stepping the bounds of reason, and in a second and further instrument (Rec., pp. 14-16), afterwards submitted by him, he was some-

what more reasonable (though still apparently oblivious of the fact that the terms of employment had been fully agreed upon), and consented to pay the architects for this subordinate supervision, an additional fee decided upon by himself, without reference to any schedule whatever, $50. a day for members of the firm, and $10. a day for any of its employees. He retained himself, however, as ultimate and final judge, as to when and how the architectural supervision should be rendered by the claimants (Rec., p. 15).

The compensation had been fixed by the programme of competition, and any change in this matter was a violation of the claimants' rights and a breach of the agreement.

If it were necessary to show further that the compensation of architects for the Government, as insisted upon by the claimants in this case, is a fair one, we have but to call the Court's attention to its own decision in the case of Smithmeyer *v.* United States, 147 U. S., 342.

This Court in that case affirmed the Court of Claims, which found, "Finding 9," that:

> "these are the rates and rules established by the custom and usage of the profession, and are *never deviated from* by architects in good standing, except under exceptional circumstances, then only by a special and express contract. * * * In a number of cases the executive branch of the government has employed architects at the rate prescribed by the foregoing schedule of the American Institute of Architects."

Still later on, June 27, 1906, the Court of Claims in the same case transmitted its findings to Congress, in the course of which (Finding 10), it stated:

> "It is the custom where the government of the United States employs private architects, in competition, to prepare plans and specifications and to superintend the construction of public buildings, to recognize the schedule of fees as fixed by the American Institute of Architects as being reasonable and fair, and to base the architect's compensation thereon."

POINT III.

The measure of the damages which the claimants are entitled to recover for the breach of their contract, is the compensation which the contract awarded them, and which they would have received had they been permitted to complete their performance of it.

The general rule of damages for breach of contract, is that *compensation* for the breach should be made to the injured party; the measure of damages in such cases is the value of the bargain to the complaining party, or the loss which a fulfilment of the contract would have prevented or the breach of it has entailed. (Amer. & Eng. Ency. of Law, vol. 8, p. 633).

There are two or three cases directly in point. First, that of Wicker *v.* Hoppock, in 6 Wall (U. S.), 94-99. There this Court, by Mr. Justice Swayne, said:

> "The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed. * * * As soon as there is a breach of the contract recovery may be had and the measure of damages is the full amount agreed to be paid."

In the case of Thompson *v.* Wood, 1 Hilton (N. Y.), 93, 94, the Court held, that the plaintiff was entitled to recover as damages, the full amount for which he had been employed, unless it appeared that he could have obtained other and similar employment; and that the burden of proof rested on the defendant to show that the claimant could, in such an instance, have obtained other employment.

These cases show conclusively that *prima facie* "the measure of damages is the full amount agreed to be paid"; and that the burden of proof in setting forth and establishing circumstances in mitigation of damages, is always with the defendant. The authorities fully sustain this view.

Sedgwick in his work on Damages, 8th Ed., Vol. 2, p. 272, says:

> "In some cases, the plaintiff may recover the whole contract price. A common case is that of a schoolmaster. If a scholar is removed from school during a quarter, the master may recover the tuition fee for the whole quarter. Citing cases of Collins *v.* Price, 5 Bing., 132; Sprague *v.* Morgan, 7 Ala., 952."

In the case of Collins *v.* Price, a child at school, for whom payment had been made quarterly, was sent home for illness four days after the commencement of the quarter, and never returned. The schoolmaster sued for the full quarter tuition, and the Court held that the master was entitled to the whole quarter's tuition, although there was not an express contract for a quarter's notice, or a quarter's pay, and although the school was a day school at which the child was the only boarder.

The case of Sprague *v.* Morgan held, that where there was a contract to pay a gross sum for the tuition of pupils, and they are taken from school before the expiration of the term without any fault of the teacher, he is entitled to recover the whole sum.

Sedgwick then proceeds:

> "So upon an agreement to pay the plaintiff a certain amount for his legal services in a pending litigation, he may recover the agreed amount if the controversy is brought to an end by compromise."
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> Hunt *v.* Test, 8 Ala., 713.
> Baldwin *v.* Bennett, 4 Cal., 392.

In the former case there was a contract for professional services, part of which the plaintiff performed. During the performance, without his knowledge, a compromise was effected. A suit for the full contract price was brought, and the court held, he could recover full contract price.

In Baldwin *v.* Bennett, there was a contract for legal services, and certain services were actually rendered by the plaintiff under such contract. Pending litigation, the case was settled by the defendant, and the plaintiff sued to recover the price agreed to be paid, and did recover.

Sedgwick proceeds further:

> "Where it was agreed that the plaintiff should weigh all the grain carried over the defendant's road at a stipulated price, and the defendant allowed another to weigh the grain, the plaintiff was allowed to recover at the contract price all the grain thus weighed by another."

Citing Lake Shore M. S. Railway Co. *v.* Richards, 126 Ill., 448.

In commenting upon these cases, Mr. Sedgwick continues:

> "The principle upon which these cases rest, seems to be that the whole contract price is to be given, because it is impossible to show with *the required certainty any pecuniary outlay which the plaintiff* has been saved by the breach."
>
> "The school must continue its session with its entire corps of instructors, although a scholar is withdrawn; the office of a weigher of grain must still be kept open, and at the same expenses, though part of the anticipated custom fails."
>
> "It would seem necessary then that in order to have the cost of performance subtracted from the contract price, the defendant must in a case of doubt be prepared to show affirmatively that the performance would have cost the plaintiff something which he has been saved by the breach, and *to prove the amount* definitely."

It is impossible to find cases more analogous to that under consideration. As Sedgwick so aptly says,—the school, the law office and the weighing office must continue at the same expense, although deprived of some of their profits.

Similarly in this case the architect's office must continue and be maintained at the same expense, though part of the anticipated and agreed compensation fails.

If ever a case existed in which it was impossible to estimate the measure of damages, except by giving the agreed contract price, the present is a leading example. No attempt has been made by the defendant to show any circumstances which would tend to mitigate or lessen the damages, or reduce them from

the full contract price at which the claimants were entitled to perform their services. And no successful or serious attempt has been made to in any way justify the arbitrary and unjustifiable action of the defendant in discharging the claimants without cause, and preventing their completing the contract.

Conclusion.

It is respectfully submitted that the judgment of the Court of Claims should be reversed and judgment entered for the claimants for the full amount under the contract.

Dated, January 2nd, 1910.

BENJAMIN F. TRACY,
PAUL FULLER,
CHARLES FULLER,
Counsel

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

AUSTIN W. LORD AND J. MONROE HEWLETT, doing business under the firm name and style of Lord & Hewlett, appellants.
v.
THE UNITED STATES.
No. 162.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This suit was brought by a firm of New York architects to recover $75,000 damages for the breach of an alleged contract to furnish to the Secretary of Agriculture complete plans for the erection of a new administrative building for the Department of Agriculture at Washington, D. C., and to supervise the construction of said building.

The suit arose out of the following state of facts: In the appropriation act for the Department of Agriculture for the fiscal year ending June 30, 1902, approved March 2, 1901 (31 Stat., 922–938), there was

inserted by the Committee on Agriculture an item, prepared by the Department of Agriculture, which reads as follows:

> To enable the Secretary of Agriculture to have prepared, under his direction, plans for a fireproof administrative building, to be erected on the grounds of the Department of Agriculture, in the city of Washington, said plans and such recommendations thereon as the Secretary of Agriculture may deem necessary, to be transmitted to Congress at its next regular session, five thousand dollars, to be immediately available.

In order to procure plans in accordance with this act, the Secretary of Agriculture appointed a commission, consisting of himself, the Supervising Architect of the Treasury, D. H. Burnham, of Chicago, Chas. F. McKim, of New York, and F. L. Olmstead, of Boston, whose duties should be, first, to select and secure the consent of ten architects to submit plans in competition; and, second, to decide upon the most suitable plans for the building from among those submitted by the competing architects.

For the information of the competing architects the Secretary approved a circular prepared by the Supervising Architect of the Treasury entitled "Programme and Conditions of a Competition for a Building for the Department of Agriculture, in Washington, D. C.," which stated that "while the ultimate purpose of the competition is the selection of an architect, the act does not provide for a building, but simply for a design to be approved by Congress at the next

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session; and, therefore, while it is to be *supposed* that the architect or firm of architects whose designs shall be placed first in this competition will receive the commission to carry out the work *when the building is authorized, it must be understood that the Secretary of Agriculture has no authority at this time to enter into any contract further than is provided for by this programme.* The programme sets forth, approximately, the conditions and location of the building, modifications of which may become necessary. If Congress provides for the erection of *the* building, the selected architect is then to prepare such design or designs as may, in the judgment of the Supervising Architect of the Treasury, be necessary to meet the conditions finally adopted by him." (Italics ours.)

The compensation of the commission and competing architects was fixed and the statement made that unless otherwise provided by act of Congress the architect or architects whose design should win in the competition would be awarded the commission for carrying out the work at a "fee computed on the basis of the schedule of charges adopted by the American Institute of Architects." The department expressly reserved to itself the right to reject any and all designs and to reopen the competition if no suitable design in all respects should be submitted. The entire cost of the building was limited to $2,000,000. (Rec., pp. 7, 8.) Among the competing architects was the firm of Lord & Hewlett, the appellants, whose plans, providing for a building to cost not less than $2,500,000, were successful in the competition, and

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a bill providing for an appropriation for that amount to erect the building, together with the original plans of the claimants, accepted by the commission, were sent to Congress. This bill never became a law. (Rec., pp. 10, 11.)

Shortly after the passage of the act of March 2, 1901, authorizing plans for the Agricultural building, James Knox Taylor, Supervising Architect of the Treasury Department, was designated as an expert adviser by the Secretary of Agriculture; and an advisory building committee was also formed by the Secretary of Agriculture, consisting of Dr. B. T. Galloway, chairman; Dr. D. E. Salmon, and Mr. A. C. True. Neither Mr. Taylor nor any of the members of this committee had authority to enter into any contract or agreement with the claimants. (Rec., p. 11.)

After the submission of the plans and specifications of the appellants, no further steps were taken by Congress until February 9, 1903, when an act prepared by the Committee on Public Buildings and Grounds of the House of Representatives, without the knowledge or assistance of the Secretary of Agriculture, was passed (32 Stat., 806), which reads as follows:

> AN ACT For the erection of a building for the use and accommodation of the Department of Agriculture.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of

Agriculture be, and he is hereby, authorized and directed to cause a suitable and commodious fireproof building, for the use and accommodation of the Department of Agriculture, *including all of its bureaus and offices now occupying rented quarters in the District of Columbia, to be erected on such portion of the grounds of the Department of Agriculture belonging to the United States as he may deem expedient*, immediately in the vicinity of the present building, *said building to be constructed in accordance with plans to be procured, based on accurate estimates*, providing for the erection of said building, complete in all of its details, as herein described, and within the total cost of not exceeding the sum herein stipulated, and he is hereby authorized, after procuring such plans, and after due advertisement for proposals, to enter into contracts within the limit of cost hereby fixed, and subject to appropriations to be made by Congress, for the erection of said building complete, including heating and ventilating apparatus, elevators, and approaches, and the removal of the present building or buildings of the Department of Agriculture on said grounds.

SEC. 2. That the supervision of the construction of said building shall be placed in charge of an officer of the Government especially qualified for the duty, to be appointed by the Secretary of Agriculture, subject to the approval of the head of the department in which such officer is employed, who shall receive for his additional services an increase of

twenty-five per centum of his present salary, such increase to be paid out of the appropriation for the building herein authorized.

SEC. 3. That the limit of cost for the construction of said building complete, including heating and ventilating apparatus, elevators, and approaches, and the cost for removal of the present building or buildings of the Department of Agriculture, is hereby fixed at one million five hundred thousand dollars, and no contract shall be entered into or expenditure authorized in excess of said amount.

Approved, February 9, 1903. (Rec., pp. 10 and 11.)

Subsequent to the passage of the act of February 9, 1903, negotiations were entered into with the appellants, numerous letters were interchanged, and personal consultations were held between the appellants and Mr. Taylor, expert adviser, and Doctor Galloway, chairman of the advisory committee, relating to plans and specifications for the erection of such a building as was provided for by the act of February 9, 1903. At no time during the pendency of these negotiations and up to May 4, 1903, when Mr. Taylor was superseded as expert adviser to the Secretary of Agriculture by Captain Sewell, had the appellants and the Secretary, or any person or committee appointed to act for him, agreed upon or accepted any specific plans or specifications theretofore prepared and submitted by the appellants for the erection of the building. On the contrary,

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they could not agree, and relations were terminated by the following letter:

U. S. DEPARTMENT OF AGRICULTURE,
BUREAU OF PLANT INDUSTRY,
OFFICE OF CHIEF OF BUREAU,
Washington, D. C., April 15, 1903.

LORD & HEWLETT,
16 East 23rd Street, New York City.

GENTLEMEN: I am directed by the honorable Secretary of Agriculture to inform you that it appears from the statements made by you and by Mr. Taylor, the Supervising Architect, that there seems to be some doubt as to his ability to carry out the spirit and letter of the law in regard to the proposed buildings for this department. For this reason he instructs me to say that he wishes to terminate present relations in order to be free to take the entire matter under reconsideration along different lines, if it is thought best to do so.

Very respectfully,
B. T. GALLOWAY,
Chairman, Advisory Building Committee.
(Rec., p. 11.)

To which the appellants replied as follows:

APRIL 17, 1903.

DEAR SIR: We are in receipt of a communication from Doctor Galloway, chairman of your advisory committee, stating that it appears from the statements made by us and by Mr. Taylor, the Supervising Architect, that there seems to be some doubt as to your being

able to carry out the spirit and letter of the law in regard to the proposed buildings for your department.

We believe that there must be some misapprehension, as we are confident that this is entirely possible and, as we understood it, the purpose of our recent conference was merely to determine the most advisable method of procedure.

May we request a personal interview upon this matter at your earliest convenience upon your return?

Very respectfully, yours,
(Signed) LORD & HEWLETT.

Hon. JAMES WILSON,
Secretary of Agriculture,
Washington, D. C.
(Rec., pp. 11 and 12.)

After the receipt of the appellants' reply to the communication breaking off negotiations with them, a representative of their firm visited the Department of Agriculture with a view to resuming negotiations, and in consequence of that visit the appellants afterwards submitted some pencil block sketches showing rearrangements of buildings which in their judgment might be constructed to meet the requirements of the act of February 9, 1903. These were not working plans but merely block drawings, on tracing paper, showing the grouping and arrangement of separate buildings, and were nothing more than tentative sketches capable of being shifted around in any way to locate the actual buildings themselves. When shown to the Secretary he seemed to be very well

pleased with them, and as a result the appellants were notified on May 4, 1903, of the appointment of Captain Sewell, as expert adviser, and requested to visit Washington on May 7, 1903, for consultation. This invitation through one of the members of the building committee, expressed the hope that a conclusion would be reached which would enable the architects to begin work at once on their plans. (Rec., p. 12.)

On February 16, 1903, Mr. Taylor, expert adviser, who possessed no authority to do so (Rec., p. 11), had submitted to the appellants for their examination and approval, a formal contract looking toward the employment of the appellants in the construction of the building, in which the compensation set forth was 5 per cent of the amount to be expended in the erection thereof. The appellants do not appear to have examined, approved, executed, or returned this contract, and what disposition was ever made of it has not been shown. (Rec., p. 16.)

On and after May 4, 1903, negotiations were carried on between the appellants and Captain Sewell, expert adviser, relating exclusively to the preparation and execution of a written contract providing for their employment as architects of the said building. Captain Sewell had prepared and submitted to the appellants two forms of contract in which their compensation for services as architects for the erection of the building was fixed at $3\frac{1}{2}$ per cent of the contract price, and pay for the actual time spent

and expenses incurred in the supervision of work on the building. After much correspondence, discussing the propriety of the fee offered by the contract and the respective duties of architect and supervisor of construction, provided by the act of February 9, 1903, the appellants declined to accept the terms of contract, insisting that they were entitled to 5 per cent upon the actual cost of the building, "for full professional services (including supervision)," provided by the schedule of minimum charges of the American Institute of Architects, and that they had been employed under the programme issued by the Secretary in pursuance of the act of March 2, 1901, *supra*. (Rec., pp. 12–16.)

The schedule of charges for a full set of drawings, but without supervision, provided for a compensation of 3½ per cent upon the cost of the work. (Rec., p. 17.)

On January 7, 1908, this case was argued and submitted, and on March 9, 1908, judgment was rendered by the Court of Claims dismissing the petition of the claimants, and from that judgment the case now comes up on appeal in this court.

ARGUMENT.

FINDINGS OF FACT OF THE COURT OF CLAIMS.

It has never been claimed in this case that there was a written or even a formal contract between the appellants and the United States, but it is contended that the different acts of the claimants and the agents

of the Government in relation to the plans for the proposed building when considered together amounted to an express contract between the parties.

The Court of Claims, after carefully considering all the facts presented by the evidence, has stated in its findings of fact, and repeated in its opinion, the all-important fact that at no time during the entire progress of the negotiations were the appellants and the Government in entire accord upon either the plans or the terms of employment; in other words, that no agreement was ever reached. This court will not review the findings made by the court below. (McClure *v.* United States, 116 U. S., 145; Talbert *v.* United States, 155 U. S., 45; District of Columbia *v.* Barnes, 197 U. S., 146, 150; Sisseton and Wahpeton Indians *v.* United States, 208 U. S., 261, 266.) Therefore, there is in reality no contract for the court to consider.

THE PLANS WERE NOT ACCEPTED BY CONGRESS.

The appellants were never employed as the architects of the administrative building to be constructed for the Agricultural Department. There never was a time during the entire negotiations when the appellants and the Secretary of Agriculture were agreed upon all points. There never were plans submitted by the appellants which were accepted by the Government.

The act of March 2, 1901, appropriated $5,000 for plans to be secured by the Secretary of Agriculture,

which should be transmitted to Congress at its next regular session, together with such recommendations as the Secretary should deem necessary. Congress by this act constituted itself the sole judge of the suitability of the plans to be procured under the act and offered $5,000 for plans. It did not even by implication agree that these plans would be accepted. It did not authorize the erection of a building, and it did not authorize the employment of an architect, but simply authorized the securing of plans in whatever manner the Secretary should consider best.

The Secretary of Agriculture, in order to carry out the provisions of the act, determined upon a competitive test, and selected a board of judges, himself being one of the number, who should select ten architects to compete for employment as architects of the building.

The programme of conditions was formulated and approved by the Secretary for carrying out the details of the competition. This programme was the construction placed by the Secretary upon the act providing for the plans. It only promised that the plans would be referred to Congress for its action, and the competing architects were clearly advised that the plans which should be successful in the competition must be approved by Congress in order to entitle the architects submitting them to employment.

The appellants were successful in the competition, but their plans provided for the construction of a building costing in excess of the limit fixed by

the programme, and consequently did not even comply with the programme in that important particular. The plans submitted by the appellants called for a building that would have cost at least $2,500,000, instead of $2,000,000, as provided in the specifications.

> Where plans are required for a building not to exceed a certain sum, or are accepted on condition that it can be erected for a given amount, there can be no recovery by the architect unless the building can be erected for the sum named.
>
> And if an architect submits estimates of the probable cost of the building he can not recover for his plans unless the estimate is reasonably near the actual cost. (Amer. & Eng. Enc. of Law, 2d ed., vol. 2, p. 818.)

The Secretary of Agriculture prepared and transmitted to Congress a bill providing for the acceptance of the plans submitted by the appellants at the competition, and the appropriation of $2,500,000 to construct the buildings called for by the plans, and the plans were transmitted with the bill. The bill, however, never became a law, but Congress passed the act approved on February 9, 1903, *supra*, which authorized the Secretary of Agriculture *to procure new plans and accurate estimates for the building, and absolutely limited the cost to $1,500,000*, and for the first time authorized the Secretary of Agriculture, after procuring the plans, "to enter into contracts within the limit of cost hereby fixed." The act

also provided that the supervision should be exercised by a government official especially qualified for the work.

The provision directing the Secretary to procure other plans and accurate estimates was an assertion by Congress, in the only way possible, that neither the plans nor the estimates which had been procured by the Secretary, and upon which the appellants had risked their chance of employment, were suitable or acceptable for the proposed building.

NO AGREEMENT WAS REACHED AFTER THE PASSAGE OF THE ACT OF FEBRUARY 9, 1903 (REC., PP. 10 AND 11).

The passage of the act of February 9, 1903, so far as the original plans which were successful in the competition were concerned, absolutely terminated all negotiations between the appellants and the Secretary of Agriculture, and everything which had transpired in pursuance of the act of March 2, 1901, was brushed aside.

The Secretary, although he was satisfied that he was under no legal obligation to employ the appellants, determined, however, as a matter of courtesy and fairness, to give them an opportunity to secure the compensation for the execution of plans drawn in accordance with the act making appropriation for the building, and with that end in view they were invited to prepare plans, and data was forwarded to them for their assistance.

In accordance with this invitation negotiations were resumed, and there were several meetings at

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Washington between the appellants and the Secretary of Agriculture, which were without result, as the appellants appeared to be determined to prepare no plans that would come within the appropriation of the act of February 9, 1903, and the Secretary was determined that he would accept none which did not meet the provisions of that act. The result was that two days after the meeting of April 13, 1903, negotiations were broken off with the appellants and the Supervising Architect of the Treasury, Mr. Taylor, was superseded as expert adviser to the Secretary of Agriculture by the appointment of Captain Sewell. (Rec., p. 11.)

A few days afterwards, at the earnest solicitation of the appellants, they were given another opportunity to submit plans, which they did—not working plans, but mere block sketches which were capable of being shifted around to show rearrangements of the buildings. The Secretary then submitted to them the contract prepared by Captain Sewell, his expert adviser, which they absolutely refused to agree to or to sign, upon the ground that they had been employed under the terms of the original competition and were entitled to receive the fees for full service, including supervision, provided by the schedule of the American Institute of Architects. The Secretary then finally broke off all negotiations with them and employed another firm of architects.

After the passage of the act of February 9, 1903, *supra*, which ignored the plans submitted by the appellants in the competition, the Secretary was

under no obligation whatever to agree to a contract drawn to meet the charges of the schedule of the American Institute of Architects. The act of March 2, 1901, did not authorize the Secretary to adopt this schedule of charges as fixing the compensation of the architects to be employed. It simply authorized him to procure plans to be transmitted to Congress, together with such recommendations as he should see fit to make, and any recommendations outside of the provisions of the act must necessarily have depended for their validity upon ratification by Congress. Instead of ratifying the fee of 5 per cent, which included supervision at 1½ per cent, Congress provided, in the act of February 9, 1903, for supervision by a qualified government official. Notwithstanding that fact, however, the contract actually submitted to the appellants, drawn as stated by Captain Sewell, was in accordance with the schedule—that is, the compensation was fixed at 3½ per cent on the amount appropriated, without supervision, except such as might be required of the appellants on certain specified occasions, and paid for at the rate of $50 per day and traveling expenses. To this proposition the appellants refused to agree, whereupon the Secretary finally broke off all negotiations.

It is an elementary principle of law that an offer made by one party must be accepted by the other without alteration of its terms or conditions in order to render it a contract between the parties.

> An offer of a bargain by one person to another imposes no obligation upon the former,

unless it is accepted by the latter upon the terms on which it was made. Any qualification of or departure from them invalidates the offer, unless the same be agreed to by the party who made it. *Eliason* v. *Henshaw*, 4 Wheat., 225. See also *Webb* v. *Alton Marine and Fire Insurance Co.*, 8 Ill., 225; *Maclay* v. *Harvey*, 90 id., 525. (*Tilley* v. *County of Cook*, 103 U. S., 161.)

AUTHORITIES CITED BY APPELLANTS.

The appellants contend that they were employed as architects for the construction of the Agricultural building by virtue of the success of their plans in the competitive test prescribed by the Secretary of Agriculture under the authority contained in the act of March 2, 1901, *supra*, and have cited in support of their position the case of Palmer *v.* Cent. Bd. of Education (220 Pa. St. R., 568), which grew out of the following state of facts:

The central board of education of Pittsburg, having decided to erect a school building, appointed a building committee, authorizing it, among other things, to select, subject to the approval of the board, a competent architect. The committee was afterwards authorized to select an architect by competitive test, after which instructions were prepared and architects were invited to submit plans in competition. Several did so, and the committee selected one of the plans and reported their action to the school board, which took no action upon the report, but appointed a new building committee with authority to procure plans

in open competition from all competent architects, and under this scheme an architect was selected. Thereupon three of the competitors under the first scheme filed a bill in equity to compel the board to proceed under the old plan and make their selection in accordance therewith.

The court, upon the familiar principle that where a public official or board has been vested with discretion the courts by mandamus may compel him or it to act, though they are without power to dictate what his or its action may be, said:

> The decree entered simply restrains the appellants from awarding the plans for the construction of the school building and selecting an architect to superintend the construction of the same, outside of the nine architects who had entered into competition, *until the plans submitted by said architects shall have been acted upon in the manner set forth in the resolution of the board May 8, 1906.* The decree exacts nothing of the appellants beyond what good faith requires and what the plaintiffs had a right to demand (p. 577).

While expressing a doubt as to the applicability of the remedy in the Palmer case, in the event that Congress had failed to act on the bill and plans submitted by the Secretary of Agriculture, the contingency which called forth the restraining order in that case did not happen in the case at bar, for Congress did act, and in the only way possible, by passing a bill in which it expressed its disapproval of the plans and estimates of the appellants and the recommendation

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of the Secretary of Agriculture. The act of February 9, 1903, directed the Secretary to procure new plans and accurate estimates. It limited the cost of the building to $1,500,000, instead of $2,500,000 called for by the estimates of the appellants. It directed the Secretary to employ a public official especially qualified to supervise the construction of the building, and gave to the Secretary, for the first time, the authority to enter into a contract.

After the rejection of the plans and estimates of the appellants by Congress, the Secretary, under the decision in the Palmer case, was left at liberty to employ other architects in any manner he saw fit.

The appellants have also cited several authorities upon the measure of the damages to which they would be entitled in the event that this court should reverse the decision of the Court of Claims. This, we think, was entirely unnecessary, for if the decision of this court should be against the Government the case would be remanded to the Court of Claims for consideration of the question of damages. We do not believe the court will consider the question upon this appeal.

It is respectfully submitted that as there was no contract between the parties in this case, the decision of the Court of Claims should be affirmed.

JOHN Q. THOMPSON,
Assistant Attorney-General.
GEORGE M. ANDERSON,
Attorney.

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